No. 141, Original

In the Supreme Court of the United States

STATE OF TEXAS, PLAINTIFF

v.

STATE OF NEW MEXICO

AND

STATE OF COLORADO

ON BILL OF COMPLAINT

MOTION OF THE UNITED STATES FOR LEAVE TO INTERVENE AS A PLAINTIFF, COMPLAINT IN INTERVENTION, AND MEMORANDUM IN SUPPORT OF MOTION TO INTERVENE AS A PLAINTIFF

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MOTION OF THE UNITED STATES FOR LEAVE TO INTERVENE AS A PLAINTIFF

On January 27, 2014, the Court granted Texas's motion for leave to file a bill of complaint against New Mexico and Colorado and invited New Mexico to file a motion to dismiss in the nature of a motion under Rule 12(b)(6) of the Federal Rules of Civil Procedure. In the complaint, Texas seeks declaratory relief, a decree requiring New Mexico to deliver water to Texas in accordance with the Rio Grande Compact, Act of May 31, 1939, ch. 155, 53 Stat. 785, and damages. Compl. 15-16.

The United States moves for leave to intervene as a plaintiff in this action. Intervention of the United States is appropriate where "distinctively federal interests, best presented by the United States itself, are at stake." *Maryland* v. *Louisiana*, 451 U.S. 725, 745

n.21 (1981). The United States has several distinct interests in this dispute. The parties' dispute concerns water released by the Rio Grande Project (Project), a Bureau of Reclamation project that the Department of the Interior operates, including by setting the diversion allocations for water users who have contracts for delivery of Project water. The Court's interpretation of the parties' rights and obligations under the Compact would affect how the Bureau of Reclamation calculates those diversion allocations. The United States' interest in how the Project is operated is a distinctively federal interest that is best presented by the United States.

The United States also has a distinct interest in ensuring that water users who either do not have contracts with the Secretary of the Interior under the Project, or who use water in excess of contractual amounts, do not intercept or interfere with release and delivery of Project water that is intended for Project beneficiaries or for delivery to Mexico pursuant to the Convention Between the United States and Mexico Providing for the Equitable Distribution of the Waters of the Rio Grande for Irrigation Purposes, May 21, 1906, U.S.-Mex., 34 Stat. 2953.

The United States' proposed complaint in intervention is appended to this motion. The basis for this motion is explained more fully in the memorandum that then follows.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General

FEBRUARY 2014

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COMPLAINT IN INTERVENTION

1. The jurisdiction of this Court is invoked under Article III, Section 2, Clause 2 of the Constitution and 28 U.S.C. 1251(a).

2. The Rio Grande rises in Colorado, flows south into New Mexico, then flows into Texas near El Paso. After crossing the New Mexico-Texas state line, the Rio Grande forms the international boundary between the United States and Mexico until it flows into the Gulf of Mexico near Brownsville, Texas.

3. In 1905, Congress authorized construction of a Bureau of Reclamation (Reclamation) project known as the Rio Grande Project (Project) to provide a reliable irrigation system for southern New Mexico and western Texas. The construction of Elephant Butte Reservoir, the largest storage facility in the Project, was completed in 1916. Elephant Butte Reservoir is

in New Mexico, approximately 105 miles north of the Texas state line. It is a federally owned Reclamation facility.

4. On March 18, 1938, Colorado, New Mexico, and Texas signed the Rio Grande Compact (Compact). A representative of the United States participated in the negotiation of the Compact, and Congress approved the Compact in the Act of May 31, 1939, ch. 155, 53 Stat. 785.

5. The preamble to the Compact states that Colorado, New Mexico, and Texas entered into the Compact "for the purpose of effecting an equitable apportionment" of "the waters of the Rio Grande above Fort Quitman, Texas." 53 Stat. 785.

6. Article IV of the Compact requires New Mexico to deliver water at San Marcial, New Mexico—a gaging station upstream of Elephant Butte Reservoir—in an amount that is determined by a schedule. In 1948, the Rio Grande Compact Commission changed the gage for measuring New Mexico's delivery obligation from San Marcial to Elephant Butte Reservoir.

7. Article I(k) of the Compact defines "project storage" as the combined capacity of Elephant Butte Reservoir and other reservoirs "below Elephant Butte and above the first diversion to lands of the Rio Grande Project." 53 Stat. 786. Article I(*l*) defines "usable water" as water "in project storage" that is "available for release in accordance with irrigation demands, including deliveries to Mexico." *Ibid.*

8. Pursuant to contracts with the Secretary of the Interior (Secretary) executed under federal reclamation law, the Project delivers stored water to two

irrigation districts—Elephant Butte Irrigation District (EBID) in New Mexico, and the El Paso County Water Improvement District No. 1 (EPCWID) in Texas—for the irrigation of approximately 155,000 acres of land (67,000 acres in Texas, and 88,000 acres in New Mexico). Those acreages, which are roughly equivalent to 43% for EPCWID and 57% for EBID, were confirmed in a contract between EPCWID and EBID that was signed on February 16, 1938, approximately one month before Colorado, New Mexico, and Texas signed the Compact.

9. The Project also delivers water to Mexico pursuant to the Convention Between the United States and Mexico Providing for the Equitable Distribution of the Waters of the Rio Grande for Irrigation Purposes, May 21, 1906, U.S.-Mex., 34 Stat. 2953. Except during extraordinary drought, the treaty guarantees to Mexico 60,000 acre-feet of water per year delivered from the Project.

10. Article II of the treaty provides that in cases of extraordinary drought, "the amount [of water] delivered to the Mexican Canal shall be diminished in the same proportion as the water delivered to lands under [the] irrigation system in the United States." 34 Stat. 2954.

11. The Project is designed to deliver more water than it releases from storage. That is because water delivered for irrigation is never completely consumed. Some portion of the initial deliveries seeps into the ground or flows off the agricultural fields into drains to become "return flows." When those return flows get back to the river, they can be delivered to Project beneficiaries downstream. Return flows have histori-

cally comprised a significant part of the Project's deliveries.

12. Only persons having contracts with the Secretary may receive deliveries of water, including seepage and return flow, from a Reclamation project. See, *e.g.*, 43 U.S.C. 423d, 423e, 431, 439, 461. Accordingly, the only entity in New Mexico that is permitted to receive delivery of Project water is EBID, pursuant to its contract with the Secretary.

13. New Mexico has allowed the diversion of surface water and the pumping of groundwater that is hydrologically connected to the Rio Grande downstream of Elephant Butte Reservoir by water users who either do not have contracts with the Secretary or are using water in excess of contractual amounts.

14. When water is extracted from the surface or the ground at places below Elephant Butte Reservoir, it affects surface water deliveries downstream. The Project may have to release additional water from storage to offset such extractions in order to maintain delivery of any given quantity of water to downstream users. Consequently, extraction of water that is hydrologically connected to the Rio Grande below Elephant Butte Reservoir has an effect on the amount of water stored in the Project that is available for delivery to EBID and EPCWID, as well as to Mexico.

15. Uncapped use of water below Elephant Butte Reservoir in New Mexico could reduce Project efficiency to a point where 43% of the available water could not be delivered to EPCWID, and 60,000 acre-feet per year could not be delivered to Mexico.

16. New Mexico has asserted that the United States is an indispensable party to this action.

WHEREFORE, the United States prays that the Court:

(a) declare that New Mexico, as a party to the Compact:

(i) may not permit water users who do not have contracts with the Secretary of the Interior to intercept or interfere with delivery of Project water to Project beneficiaries or to Mexico,

(ii) may not permit Project beneficiaries in New Mexico to intercept or interfere with Project water in excess of federal contractual amounts, and

(iii) must affirmatively act to prohibit or prevent such interception or interference;

(b) permanently enjoin and prohibit New Mexico from permitting such interception and interference;

(c) mandate that New Mexico affirmatively prevent such interception and interference; and

(d) grant such other relief as the Court may deem appropriate and necessary to protect the rights, duties, and obligations of the United States with respect to the waters of the Rio Grande.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General

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This action concerns the interpretation of the Rio Grande Compact (Compact), Act of May 31, 1939, ch. 155, 53 Stat. 785, which apportions the water of the Rio Grande Basin among the States of Colorado, New Mexico, and Texas. Preamble, 53 Stat. 785. On January 27, 2014, the Court granted Texas's motion for leave to file a bill of complaint against New Mexico and Colorado and invited New Mexico to file a motion to dismiss in the nature of a motion under Rule 12(b)(6) of the Federal Rules of Civil Procedure. The United States respectfully moves for leave to intervene in this action as a plaintiff.

1. In 1905, Congress authorized construction of a Bureau of Reclamation (Reclamation) project known as the Rio Grande Project (Project) to provide a reliable irrigation system for southern New Mexico and western Texas. See Act of Feb. 25, 1905, ch. 798, 33

Stat. 814. Construction of the Project began in 1910, and Elephant Butte Reservoir, the largest storage facility in the Project, was completed in 1916. Nat'l Res. Comm., *Regional Planning, Part VI—The Rio Grande Joint Investigation in the Upper Rio Grande Basin in Colorado, New Mexico, and Texas, 1936-1937*, at 73, 83 (1938) (*Joint Investigation*). Elephant Butte Reservoir is in New Mexico, approximately 105 miles north of the Texas border. It is a federally owned Reclamation facility.

In 1906, Reclamation entered into contracts with two irrigation districts: the entities now known as Elephant Butte Irrigation District (EBID) in New Mexico, and the El Paso County Water Improvement District No. 1 (EPCWID) in Texas. Those contracts provide for the irrigation of approximately 155,000 acres of land—67,000 acres in Texas, and 88,000 acres in New Mexico. *Joint Investigation* 73, 83. Those acreages were confirmed in a contract between EBID and EPCWID that was signed on February 16, 1938. U.S. Amicus Br. App. 1a-4a. Those proportions are roughly equivalent to 43% for EPCWID in Texas and 57% for EBID in New Mexico.

The Project is designed to deliver more water than it releases from storage by relying on "return flows." Return flows consist of water from initial deliveries that seeps into the ground or flows off the agricultural fields and makes its way back into the river for delivery downstream. In calculating diversion allocations to Project beneficiaries, return flows have historically comprised a significant part of the Project's deliveries. See *Joint Investigation* 47-49, 55, 100; *id.* at 49 ("In estimating the water supply for the major units of the upper basin under given future conditions of irri-

gation development, the return water is an important consideration.").

In addition to water that the Project delivers to EBID and EPCWID pursuant to contracts with the Secretary of the Interior (Secretary), the Project also delivers water to Mexico pursuant to the Convention Between the United States and Mexico Providing for the Equitable Distribution of the Waters of the Rio Grande for Irrigation Purposes, May 21, 1906, U.S.-Mex., 34 Stat. 2953. Except during extraordinary drought, the treaty guarantees to Mexico 60,000 acre-feet of water per year delivered from the Project. *Id.* arts. I & II, 34 Stat. 2953-2954.

On March 18, 1938, approximately one month after EPCWID and EBID entered into their contract confirming the acreage in each State that would receive Project water, the parties signed the Compact. Congress approved the Compact the following year. Act of May 31, 1939, ch. 155, 53 Stat. 785. The Compact was designed to "effect[] an equitable apportionment" of "the waters of the Rio Grande above Fort Quitman, Texas." Preamble, 53 Stat. 785.

Article IV of the Compact required New Mexico to deliver water at San Marcial, New Mexico—a gaging station upstream of Elephant Butte Reservoir—in an amount that is determined by a schedule. 53 Stat. 788. In 1948, the Rio Grande Compact Commission changed the gage for measuring New Mexico's delivery obligation from San Marcial to Elephant Butte Reservoir. Compl. ¶ra. 13; N.M. Br. in Opp. 1 n.1. Once the water is delivered by New Mexico to Elephant Butte Reservoir (*i.e.*, into "project storage" for purposes of the Compact, Art. I(k), 53 Stat. 786), it becomes "usable water" under the Compact, to be released by the

Project "in accordance with irrigation demands, including deliveries to Mexico." Art. I(*l*), 53 Stat. 786.

2. In its complaint, Texas contends that once New Mexico delivers water to Elephant Butte Reservoir as required by Article IV of the Compact, the water "is allocated and belongs to Rio Grande Project beneficiaries in southern New Mexico and in Texas" and is to be distributed by the Project according to federal contracts. Compl. para. 4. Texas alleges that, contrary to that allocation, New Mexico has "increasingly allowed the diversion of surface water, and has allowed and authorized the extraction of water from beneath the ground," downstream of Elephant Butte Reservoir in New Mexico. *Id.* para. 18. New Mexico contends that, because the Compact does not require New Mexico to deliver any amount of water to the Texas state line, the Complaint does not allege a violation of any express term of the Compact. N.M. Br. in Opp. 14-21.

3. The United States asks the Court for leave to intervene as a plaintiff in this action. Intervention of the United States is appropriate where "distinctively federal interests, best presented by the United States itself, are at stake." *Maryland* v. *Louisiana*, 451 U.S. 725, 745 n.21 (1981); see *United States* v. *Louisiana*, 354 U.S. 515, 515-516 (1957) (per curiam) (intervention is warranted where "the issues in th[e] litigation are so related to the possible interests of [the party seeking to intervene] * * * in the subject matter of th[e] suit, that the just, orderly, and effective determination of such issues requires that they be adjudicated in a proceeding in which all the interested parties are before the Court"). This Court has previously granted the United States leave to intervene in original actions involving interstate water disputes in which the

United States demonstrated an important federal interest. See, *e.g.*, *Kansas* v. *Colorado*, 513 U.S. 803 (1994); *Arizona* v. *California*, 344 U.S. 919 (1953); *Nebraska* v. *Wyoming*, 304 U.S. 545 (1938); *Oklahoma* v. *Texas*, 253 U.S. 465 (1920). The United States has several distinct interests in this Compact dispute.

a. The parties' dispute concerns water released from a federal project that the Bureau of Reclamation in the Department of the Interior operates, including by setting the diversion allocations for Project water users downstream. The Court's interpretation of the parties' rights and obligations under the Compact will affect how Reclamation calculates those diversion allocations.

Pursuant to the 1938 contract between EPCWID and EBID, which was also signed by the Assistant Secretary of the Interior, see U.S. Amicus Br. App. 4a, Reclamation continues to calculate diversion allocations of Project water based on the split of 57% for EBID and 43% for EPCWID, which corresponds to the proportion of irrigable acreage in each district. See p. 2, *supra*. Reclamation now does so pursuant to a settlement agreement (the 2008 Operating Agreement) entered into by Reclamation, EBID, and EPCWID. Under that agreement, Reclamation uses a regression analysis showing how much water should be available for delivery, accounting for return flows, from a given volume of water released from the Project based on 1951-1978 hydrological conditions. See U.S. Bureau of Reclamation, Dep't of the Interior, *Supplemental Environmental Assessment, Implementation of the Rio Grande Project Operating Procedures, New Mexico and Texas* 3-7, 12 (June 21, 2013), http://www.usbr.gov/uc/albuq/envdocs/ea/riogrande/op-Proced/Supplemental/

Final-SuppEA.pdf (*Supplemental Environmental Assessment*). After subtracting Mexico's share of the water, see p. 3, *supra*, Reclamation assigns 43% of the available water to EPCWID and 57% of the water to EBID. *Supplemental Environmental Assessment* 13-14, 18. The effect of the 2008 Operating Agreement is that EBID agrees to forgo a portion of its Project deliveries to account for changes in Project efficiency caused by groundwater pumping in New Mexico. *Id.* at 4.

If the Court were to determine in this action that New Mexico does not violate the Compact by allowing water users to extract water that is hydrologically connected to the Rio Grande from below Elephant Butte Reservoir—either without a contract with the Secretary or in excess of contractual amounts—that conclusion would undermine the assumptions underlying the United States' calculation of diversion allocations between EBID and EPCWID. The United States' interest in how the Project is operated is a distinctively federal interest that is best presented by the United States.

Furthermore, the 2008 Operating Agreement does not prohibit New Mexico from allowing or authorizing groundwater pumping. Accordingly, particularly under drought conditions, there would likely come a point at which uncapped groundwater pumping in New Mexico would reduce Project efficiency to an extent that 43% of the available water could not be delivered to Texas, even if EBID forwent *all* Project deliveries. The United States has an interest in ensuring that violations of the Compact by New Mexico do not prevent the United States from meeting its contractual obligations to Project beneficiaries.

b. The United States has a further interest in ensuring that New Mexico water users who do not have contracts with the Secretary for delivery of Project water, or who use Project water in excess of contractual amounts, do not intercept Project water or interfere with delivery of that water to other Project beneficiaries.

Since 1902, and consistently through subsequent amendments and supplements to Reclamation law, Congress has required a contract with the Secretary as a prerequisite for obtaining water from a Reclamation project. See, *e.g.*, Act of June 17, 1902 (Reclamation Act), ch. 1093, §§ 4-5, 32 Stat. 389 (43 U.S.C. 431, 439, 461); Omnibus Adjustment Act of May 25, 1926, ch. 383, §§ 45-46, 44 Stat. 648-650 (43 U.S.C. 423d, 423e);* see *Israel* v. *Morton*, 549 F.2d 128, 132-133 (9th Cir. 1977) ("Project water * * * is not there for the taking (by the landowner subject to state law), but for the giving by the United States. The terms upon which it can be put to use, and the manner in which rights to continued use can be acquired, are for the United States to fix."); *Strawberry Water Users Ass'n* v. *United States*, 576 F.3d 1133, 1148 (10th Cir. 2009) (federal law requires federal consent to change the purpose of use for Reclamation project water); cf. *California* v. *United States*, 438 U.S. 645, 668 n.21 (1978) ("[S]tate water law does not control in the distribution

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* Under the 1902 Act, contracts with the Secretary were formed through petitions from individual water users. Those individual petitions were generally replaced with contracts between water users' organizations and the Secretary. See, *e.g.*, 43 U.S.C. 423d, 423e, 477. Regardless of whether the contracts were between the Secretary and individuals or the Secretary and water users' organizations, a contract was required to obtain Reclamation water.

of reclamation water if inconsistent with other congressional directives to the Secretary.") (emphasis omitted). This statutory requirement has been in place and applicable to the Project since the Compact was signed in 1938, and it was specifically reaffirmed by Congress in the same year that it approved the Compact. See Reclamation Project Act of 1939, ch. 418, § 9(d), 53 Stat. 1195 (43 U.S.C. 485h(d)).

Accordingly, the only entity in New Mexico that is permitted to receive delivery of Project water is EBID, pursuant to its contract with the Secretary. The United States has a distinctly federal interest in ensuring that this longstanding statutory requirement is not circumvented by New Mexico water users who intercept or interfere with the delivery of Project water either without a contract with the Secretary or in excess of contractual amounts.

c. The United States has a further interest in ensuring that New Mexico water users do not intercept or interfere with the delivery of Project water to Mexico pursuant to the international treaty obligation of the United States. See p. 3, *supra*. Uncapped use of water below Elephant Butte Reservoir could reduce Project efficiency to a point where 60,000 acre-feet of water per year could not be delivered to Mexico.

Furthermore, under Article II of the treaty, in the case of extraordinary drought, the quantity of water that the United States must deliver to Mexico is tied to the quantity of surface water delivered to irrigation districts in the United States. See 34 Stat. 2954 (in the case of extraordinary drought, "the amount delivered to the Mexican Canal shall be diminished in the same proportion as the water delivered to lands under [the] irrigation system in the United States"). Where

surface water deliveries to irrigation districts in the United States are being reduced as a result of extractions by water users who either do not have contracts with the Secretary or are using water in excess of contractual amounts, the United States must carefully consider whether Article II of the treaty would allow a proportional reduction of its delivery obligation to Mexico during an extraordinary drought. Ensuring that treaty obligations are satisfied is a distinctly federal interest that is best presented in this action by the United States.

4. The above interests of the United States are directly implicated in this dispute because the limitations on Project water use are incorporated into the Compact and made binding on New Mexico under the Compact. Once New Mexico complies with its obligation under Article IV of the Compact to deliver water to Elephant Butte Reservoir (*i.e.*, into "project storage," Art. I(k), 53 Stat. 786), the water becomes "usable water" under the Compact, to be released by the Project "in accordance with irrigation demands, including deliveries to Mexico." Art. I(*l*), 53 Stat. 786. Reclamation controls the release for those uses described in Article I(*l*) of the Compact pursuant to federal contracts and a treaty that were already in place when the Compact was signed. See pp. 2-3, *supra*.

New Mexico's view that it may continue to allow depletions of Project water supply below Elephant Butte Reservoir is inconsistent with the requirement that New Mexico "deliver" a specific quantity of water into project storage. See Art. IV, 53 Stat. 788; see, *e.g.*, *Black's Law Dictionary* 494 (9th ed. 2009) (defining "delivery" as "[t]he formal act of transferring

something" or "the giving or yielding possession or control of something to another"). When New Mexico "delivers" water to Elephant Butte Reservoir under the Compact, it relinquishes control of the water to the Project. The *Project* then is to release the water "in accordance with irrigation demands" for Project beneficiaries—who receive the Project water supply, including return flows derived from the released water—and for "deliveries to Mexico." Art. I(*l*), 53 Stat. 786. New Mexico's view is also inconsistent with the Compact's basic purpose, which is to equitably apportion the water of the Rio Grande Basin—from its headwaters to Fort Quitman in Texas—among the three compacting States. See Preamble, 53 Stat. 785.

5. Finally, New Mexico has asserted that the United States is an indispensable party to this action. N.M. Br. in Opp. 31-34. Granting the United States' motion for leave to intervene will eliminate that question and permit a judicial resolution of the parties' dispute over the interpretation of the Compact.

CONCLUSION

The motion for leave to intervene as a plaintiff should be granted.

Respectfully submitted.

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